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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

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Preliminary Statement

A majority of the Court has concluded that it is constitutionally permissible to establish "obscenity" by considering the manner in which publications are advertised and sold although "standing alone, the publications themselves might not be obscene" (slip op., p. 2), and that a violation of the federal mailing statute can be established on this theory. Petitioners do not seek reconsideration of these rulings.[1] However, petitioners have never been heard on how these rulings are to be applied to them. Due process requires at least that much.

I

Statutes are not immutable. They can be amended by the legislature and new meaning can be imparted

[1] We understand that *amici* may address themselves to broader issues. If rehearing is granted, we would also deal with these issues unless the Court directs otherwise.

to them by judicial construction or reconstruction. But until March 21, 1966, neither the language of 18 U.S.C. § 1461 nor the opinions of this Court gave the slightest warning that the fact that the mailer "pandered" was material or even relevant in determining the obscenity of the publications that he mailed.[2]

Roth held that the federal mailing statute, when "applied according to the proper standard for judging obscenity [as delineated by the majority there] give[s] adequate warning of the conduct proscribed * * *." 354 U.S. 476, 491.[3] Petitioners' reliance on

[2] The *Roth* majority adopted a "standard for judging obscenity" (354 U.S., at 491) which gave no consideration to a defendant's commercial motives or to the manner in which his material was advertised. The Chief Justice, concurring in the result, but not in the majority's reasoning, urged adoption of a variable standard under which the challenged materials would be judged in the context of the defendant's conduct (354 U.S., at 495-496). The fact that a defendant had engaged in the "commercial exploitation of the morbid and shameful craving for material with prurient effect" would, in his then expressed view, be relevant and perhaps decisive. That view found no other adherent until *Jacobellis*, when the Chief Justice was joined by Mr. Justice Clark in a dissenting opinion (378 U.S., at 199). In that case, he urged that the motion picture be judged in the light of its advertising (378 U.S., at 201, ftn. 2). No other member of the Court considered the manner in which the film was advertised as relevant and Mr. Justice Goldberg specifically rejected it as irrelevant. 378 U.S., at 198.

[3] Surely a defendant is not obliged to defend against a prosecutor's construction of a statute rather than its prior interpretations by this Court. But even if such a burden was placed upon petitioners, they never received fair warning that the prosecutor was relying on the theory on which they have now been found guilty.

The indictment charged that the publications were obscene on their face, and the mailings of advertisements were pleaded as separate offenses, not as elements of the obscenity of the publications (R. 6-13). The Government stipulated in lieu of a bill of particulars that the indictment "charged that [each of] the non-mailable [publications] is obscene when considered as a whole." Again

Roth is self-evident. As the Court points out (slip

there was no reference to the manner in which the publications were advertised or promoted.

In opposing petitioners' motion to dismiss the indictment, the Government stated that its "position is that the standard or test of obscenity which will ultimately be applied to the materials herein is the test set forth in *Manual Enterprises* v. *Day* * * *; *Roth* v. *United States* * * *; and *Grove Press, Inc.* v. *Christenberry* * * *." (Government's Brief in Opposition to Defendants' Motion to Quash Indictment Etc., p. 6.)

Certainly petitioners cannot have been required to do more than defend against the crime for which they were indicted (see *infra*, pp. 8-9). But even assuming that an indictment is freely amendable during the course of trial, petitioners still did not receive fair warning that they were being tried on the theory on which this Court has found them guilty. Contrary to the Court's supposition (slip op., 3, ftn. 6), when the prosecutor urged the admissibility of evidence of "intent" (R. 152, 154-155, 169), he was embellishing scienter, not proving obscenity. This is clear from the colloquy that preceded the taking of such evidence:

> "Mr. Shapiro: We propose to stipulate that the defendants did knowingly mail or cause to be mailed 'Liaison,' fully knowing the contents thereof, and we will stipulate that issue on the record. I am doing that in order to try to speed up the trial.
>
> Do you have any objections to that stipulation, Mr. Creamer?
>
> Mr. Creamer: I have no objection, Your Honor, but I reserve the right to put on any evidence as to intent that I feel fit to put on." (R. 152).

The trial court understood that such evidence was not offered to establish obscenity and its conclusion that the works were obscene did not turn upon the manner of their promotion and advertising (R. 351-353, 360-367). A claim of error based upon misattribution of this evidence of "intent" was denied by the court below on the ground that scienter had been stipulated (R. 392); and the Solicitor General took the same position in this Court (Brief in Opposition, p. 11).

Had petitioners been aware that evidence as to the mode of distribution would be used to establish obscenity, they would have certainly introduced evidence in refutation, and as we point out below, *infra*, pp. 5-7, such evidence was available in abundance. The fact that it was not offered, argues in the strongest terms that petitioners were in no way apprised of its relevancy to any contested issue in this case.

op., 5, ftn. 9), in announcing publication of Eros, petitioners advertised it to be "the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression." Now it would appear that the "adequate warning" of *Roth* has become a trap for those who fairly read it as an invitation to exercise First Amendment freedoms.[4]

In *Bouie* v. *City of Columbia,* 378 U.S. 347, this Court held that "when an unforeseeable [judicial] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime" (*id.,* at 354-355). Cf. *James* v. *United States,* 366 U.S. 213 (opinion of Warren, C.J.). A rule of law which prohibits South Carolina under the Fourteenth Amendment from giving retroactive effect to an unforeseeable judicial construction of a criminal statute should apply with equal vigor to the federal government under the Fifth.

In *James* v. *United States,* 366 U.S. 213, it was held that conduct consistent with the Court's prior interpretation of a criminal statute could not be the basis for a conviction under the statute as subsequently construed. The Chief Justice, joined by Justices Brennan and Stewart, would have dismissed the in-

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[4] "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals," *McBoyle* v. *United States,* 283 U.S. 25, 27, avid attention has been paid to the prior pronouncements of this Court proclaiming what was and what was not constitutionally protected conduct in the dissemination of works dealing with sex. If persons cannot rely on the opinions of this Court defining the range of permissible expression, that very fact "may inhibit the full exercise of First Amendment freedoms." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486.

dictment (*id.*, at 222), whereas Justice Harlan and Frankfurter would have remanded for a new trial (*id.*, at 241), but all five shared the view that the new interpretation had to be established "in a manner that [would] not prejudice those who might have relied on [the] old one." 366 U.S., at 221, 242.[5] And this Court has repeatedly held that even in a civil case, a party who relies on a reasonable interpretation of the opinions of the highest court in the jurisdiction will not be left without an opportunity to be heard should such reliance prove to be misplaced. *Pennsylvania Public Utility Commission* v. *Pennsylvania Railroad Co.*, 382 U.S. 281; *England* v. *Board of Medical Examiners*, 375 U.S. 411, 421; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678-679. If these rules are applied here, petitioners should at the very least be afforded a new trial.

If a new trial is granted in this case, the ultimate factual determination would be based upon a record quite different from that which the Court has read as establishing that petitioners were engaged in the sordid business of pandering to a shameful craving for material with prurient effect (slip op., 3-7).

Petitioners would show that their mailing lists were selected to reach persons with an interest in art, science, or literature, not smut. It is unlikely that one would find or seek out persons with a craving for material with prurient effect among subscribers to such magazines as the Bulletin of Atomic Scientists, the

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[5] Mr. Justice Clark voted to affirm the conviction because in his view the proof showed that petitioners had not placed a bona fide reliance on the prior opinions of the Court (366 U.S., at 241). Cf. *Ginzburg* v. *United States*, slip op., 5, ftn. 9.

Saturday Review or American Heritage, ticket buyers to the American Shakespeare Festival, or members of the American Medical Association, American Dental Association and American Bar Association. Yet these were typical of the mailing lists used by Eros. In the light of its intended audience, the Eros advertisement (Ex. G-10, R. 171) takes on quite a different cast from that suggested by the Court (slip op., 5, ftn. 9).

Advertisements for the Handbook were mailed in an envelope which bore the inscription "A Message from an Eminent Psychotherapist" (Ex. G-4, R. 171). This advertisement was sent to those on such mailing lists as the American Psychological Association, the American Psychoanalytic Society, general practitioners of medicine, and members of the American Bar Association. The advertisement consisted of a dignified reprint of the book's preface by Dr. Albert Ellis which recommends it to "the library of every serious researcher and professional worker in the field of sex, love, marriage, and family relations." It simply cannot be read as an appeal to a shameful craving for material with prurient effect, unless one assumes that it was intentionally mailed to salivating adolescents (slip op., 6), which it was not. The full refund "Guarantee" against postal interference was not inserted to heighten prurient interest as the Court suggests (slip op., 6), but because the Postmaster had threatened to impound the books if they were sent through the mail, a threat subsequently carried out. Among those who ordered the Handbook but did not receive it because of "postal interference" were the Veterans Administration Hospital, Lexington, Kentucky, the Psychiatric Service of the Federal Correctional Institution, Lompoc, California, the Ohio State Department

of Mental Hygiene, the Psychiatric Institute of Columbia University, and many other government institutions and universities. The roster of those who purchased petitioners' publications consists predominantly of professionals and intellectuals, and underscores both the intended audience and the non-prurient appeal of the material itself. To such an audience, publications with "sexual candor" offer truth—not smut.

Given the opportunity, petitioners would show that they mailed from Middlesex, New Jersey, not because of its name (slip op., 5), but because it was the location of the largest and best equipped mail-order facility in the eastern United States, and the Blue Ball and Intercourse letters (Exs. G, 1-2, R. 155, 157), still incorrectly attributed to petitioner Ginzburg (slip op., 4; see Pet. Br., 58-60), would be shown to be the idea and product of a member of Eros' staff.

Petitioner Ginzburg would testify that he discharged the writer of the first issue of Liaison (the one involved here) because his work was sophomoric and in bad taste. Subsequent issues of Liaison would be introduced to show how radical was the change that then took place. Petitioners would establish the credentials and caliber of the artists and writers who were engaged in the creation of their publications and these artists and writers would testify as to their understanding of the type of publications they were asked to create.

Within the context of the foregoing facts, the evidence held to establish pandering would, we submit, not prove that at all. But that is not the question before the Court. The question here is whether petitioners are to be afforded an opportunity to defend with knowledge of the standard by which their conduct is to be judged.

II

If petitioners are to be denied their day in court on the question on which their guilt has ultimately come to depend, it can only be because *Rebhuhn* v. *United States,* 109 F. 2d 512, a case decided long before *Roth,* (1) provided "adequate warning" *and* (2) "settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved" (slip op., 11, ftn. 15). The *Rebhuhn* decision was not, however, cited by the Government during the course of this litigation and was never dealt with by petitioners. If it had been raised, there would have been every reason to believe that it had been devitalized by this Court's decision in *Roth.* If it is now to be the basis of sustaining the petitioners' convictions, its limitation no less than its scope, should be respected in the case at bar. The vital limitation, in our view, is that the *Rebhuhn* defendants were charged not with mailing obscene books but "only under that part of the statute which forbids sending information of where obscene writings can be obtained" (109 F. 2d., at 514).[6] The counts on which the convictions were there sustained thus gave the *Rebhuhn* defendants notice that the mode of distribution of the publications was the essence of the charge.

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[6] There were fifteen counts in that indictment: thirteen were for depositing in the mail circulars advertising obscene books; the fourteenth was for advertising by mail where obscene books could be obtained; and the fifteenth was for conspiracy to mail both circulars and advertising in violation of the statute. See Record, Vol. I, pp. 15-82 and Brief for the United States in Opposition, pp. 3-4, in *Rebhuhn* v. *United States,* 310 U.S. 629 (No. 859, Oct. T. 1939).

Since petitioner Ginzburg was sentenced to imprisonment on the book mailing counts alone,[7] the distinction is of fundamental importance to the disposition of this case. It also is of first importance to all future prosecutions involving the application of this Court's interpretation of the statute. For such a disposition will assure that when the nature of the distribution of material, rather than only its contents, is relevant to the accusation of obscenity, the distribution will have been alleged in the indictment and the personal responsibility of defendants for such distribution proved beyond a reasonable doubt. *In re Oliver,* 333 U.S. 257, 273-276; *Russell* v. *United States,* 369 U.S. 749; *Stirone* v. *United States,* 361 U.S. 212. This alone would go far toward dispelling a book publisher's fear that he might be implicated in crime because of the manner in which a seller promotes the book.

Modification of the judgment limiting affirmance to the advertising counts would plainly serve the purpose of this Court's decision to close the mail to those who engage in the "sordid business of pandering". It would, however, serve that purpose without sacrificing fundamental values by assuring proper notice of the basis of the crime charged. And as applied to this case, it would have the added virtue of eliminating a sentence of imprisonment based upon findings that the publications here involved were obscene *per se* (see Findings 7, 9, 10, 14, 19, R. 352-353)—findings which this Court has not sustained. *Cole* v. *Arkansas,* 333 U.S. 196.

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[7] The sentence of imprisonment was imposed on those counts of the indictment which referred to the mailing of obscene publications. Petitioner Ginzburg was fined $1,000 on each of the ten advertising counts, and the corporate petitioners were fined $500 on each such count (R. 380-384).

Conclusion

Under the circumstances of this case, the five-year sentence meted out to petitioner Ginzburg should not stand. Whether it is appropriate to reverse the convictions, or remand for a new trial, or affirm limited to the advertising counts alone, need not now be decided by the Court. The only thing which need be decided now is whether this petition, presenting as it does, important questions never before briefed or argued, is sufficiently compelling to warrant consideration.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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